SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Smith v. Smith, 2011 NSSC 304

Date: 20110725
Docket: 1201-64292
Registry: Halifax

Between:

Adam Richard Smith

Petitioner

v.

Katherine Helen Smith

Respondent

Judge:	The Honourable Justice Elizabeth Jollimore
Last Submission:	July 20, 2011
Written Decision:	July 25, 2011
Counsel:	Judith A. Schoen on behalf of Adam Smith Katherine Smith on her own behalf

Introduction

[1] Both parties seek costs arising from a single day divorce and corollary relief proceeding. The relief claimed in the proceeding related to parenting, child support and setting aside a portion of the couple's 2008 separation agreement.

[2] There were four claims with regard to parenting:

a. Ms. Smith wanted to travel with Austin without being required to obtain Mr. Smith's written permission;

b. Ms. Smith wanted certain information about Austin to be provided to her;

c. Ms. Smith wanted Austin's week with one parent to be interrupted so Austin might spend time with the parent and family with whom he was not having access; and

d. both parents wanted to determine Austin's Christmas schedule.

[3] Ms. Smith sought to vary two aspects of the child support order:

a. she wanted Mr. Smith's weekly payment of $30.00 to be increased to $50.00; and

b. she wanted Mr. Smith to pay one-half of the cost of Austin travelling to Poland once each year so Austin would be exposed to his Polish heritage. She estimated this expense at $500.00 annually.

[4] Mr. Smith wanted me to order he could repay arrears of child support to Austin's R.E.S.P.

[5] With regard to the property division, Ms. Smith sought to vary terms of the agreement which denied her a share of the value of thirty-two acres of vacant land.

[6] I did not remove the requirement that each parent provide written consent to the other's travel with Austin, though I did grant Ms. Smith's request that notice periods be reduced for certain travel. I also granted her request that the parties provide information to each other about Austin. Ms. Smith was successful in modifying Austin's time with each parent during the regular weekly cycles and in having Austin's Christmas Eve access dedicated to her. She succeeded in increasing Mr. Smith's child support: it increased from $30.00 each week to $300.00 each month, an amount sufficient to provide her with $50.00 each week as well as twice as much as she had requested for Austin's travel. Mr. Smith failed in his request that I order him to pay his child support arrears to Austin's RESP: I directed him to repay the arrears to Ms. Smith.

[7] Ms. Smith failed in her claim to set aside the term of the separation agreement dividing the value of a vacant lot. I acknowledged her concerns about the circumstances in which the

agreement was negotiated, but determined that the threshold of "unconscionable or unduly harsh" required by section 29 of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275 was not met by the property division which occurred. My decision is reported at 2011 NSSC 269.

Costs, generally

[8] Justice B. MacDonald provided a helpful outline of the general principles applicable to costs awards in *Fermin v. Yang*, 2009 NSSC 222, at paragraph 3:

1. Costs are in the discretion of the Court.

2. A successful party is generally entitled to a cost award.

3. A decision not to award costs must be for a "very good reason" and be based on principle.

4. Deference to the best interests of a child, misconduct, oppressive and vexatious conduct, misuse of the court's time, unnecessarily increasing costs to a party, and failure to disclose information may justify a decision not to award costs to an otherwise successful party or to reduce a cost award.

5. The amount of a party and party cost award should "represent a substantial contribution towards the parties' [*sic* – party's] reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity".

6. The ability of a party to pay a costs award is a factor that can be considered, but as noted by Judge Dyer in *M.C.Q.* [*sic M.Q.C.*] *v. P.L.T.*, 2005 NSFC 27:

> Courts are also mindful that some litigants may consciously drag out court cases at little or no actual cost to themselves (because of public or third party funding) but at a large expense to others who must "pay their own way". In such cases, fairness may dictate that the successful party's recovery of costs not be thwarted by later pleas of inability to pay. [See *A.E.M. v. R.G.L.*, 2004 BCSC 65].

7. The tariff of costs and fees is the first guide used by the Court in determining the appropriate quantum of the cost award.

8. In the first analysis the "amount involved" required for the application of the tariffs and for the general consideration of quantum is the dollar amount awarded to the successful party at trial. If the trial did not involve a money amount other factors apply. The nature of matrimonial proceedings may complicate or preclude the determination of the "amount involved".

9. When determining the "amount involved" proves difficult or impossible the court may use a "rule of thumb" by equating each day of trial to an amount of $20,000 in order to determine the "amount involved".

10. If the award determined by the tariff does not represent a substantial contribution towards the parties' [*sic* – party's] reasonable expenses "it is preferable not to increase artificially the 'amount involved', but rather, to award a lump sum". However, departure from the tariff should be infrequent.

11. In determining what are "reasonable expenses", the fees billed to a successful party may be considered but this is only one factor among many to be reviewed.

12. When offers to settle have been exchanged, consider the provisions of the civil procedure rules in relation to offers and also examine the reasonableness of the offer compared to the parties' position at trial and the ultimate decision of the court.

[9] Success has been divided in this case. I have noted each party's relative success in paragraphs 6 and 7 above. Ms. Smith was successful in all the issues relating to child support and in all but one issue relating to parenting. She failed in her claim to set aside a term of the parties' agreement. Mr. Smith failed in the positions he advocated relating to Christmas, prospective child support and arrears of child support.

[10] Mr. Smith made a settlement offer to Ms. Smith with regard to the property issue, offering to pay money to her provided she met other conditions. Since Ms. Smith failed in her property claim, any offer to pay her is superior to the result she achieved at trial. However, Mr. Smith's offer contained other elements, for example, compromising his repayment of arrears of child support and altering access, for example. These additional elements were areas where Mr. Smith failed to achieve the result he sought at trial. The parties' success was divided.

[11] Ms. Smith was late in filing her affidavit and financial statements. Mr. Smith might have sought an adjournment to address this deficiency. He did not. In order that he was not prejudiced, certain of Ms. Smith's materials were not admitted into evidence. I see no effort by Ms. Smith to behave in a way which was oppressive or vexatious, directed at misusing the court's time or unnecessarily increasing Mr. Smith's costs. While the trial was scheduled for two days, evidence and argument were concluded in one day and only part of the second day was needed for me to give my oral decision.

[12] Ms. Smith claims that if costs were awarded against her, this could impair her ability to meet Austin's needs. This is one of the principled reasons why an award of costs can be withheld. In *Connelly*, 2005 NSSC 203**,** Mr. Connolly faced significant access costs and had been ordered to pay substantial arrears of child support. He argued that an award of costs would cause him considerable financial hardship and impair both his ability to exercise access to his children and to meet his child support obligation. At paragraph 9 of her reasons in *Connelly*, 2005 NSSC 203, Justice Gass wrote, **"**Any order of costs should not have an adverse impact on the children's emotional or material well being." This reasoning applies to Ms. Smith who has limited income and shares custody of Austin.

[13] In *Drozdowska*, 2011 NSSC 211, Justice Gass declined to award costs where success was mixed, in a case with a "multitude of issues". I agree with Justice Gass' conclusion at paragraph 17 of *Drozdowska*, 2011 NSSC 211, "with a result that was mixed, the issues being so numerous,

and the nature of the pre-trial discussions themselves somewhat conflicted and confusing, I must conclude that the parties should bear their own costs in these circumstances."

[14] Each party shall bear its own costs.

A reminder on submissions

[15] I do wish to make some comments about the submissions that were made.

[16] Mr. Smith's submissions referred to nineteen different authorities. He provided copies of none of the decisions he cited. Civil Procedure Rule 40.06(1) requires that "A brief [. . .] that refers to authorities must be filed with one book of authorities".

[17] In all but two circumstances, the citations given to the authorities were to the versions published by subscription publishers. Practice Memorandum Number 3 directs that, where possible, counsel provide the neutral citation to any case law cited in submissions for all courts in Nova Scotia. Since 2000, all decisions rendered by Nova Scotian courts have borne neutral citations and it has been required for all decisions cited to our courts since October 1, 2010.

[18] Neutral citations are particularly important in a case like this where one party is self-represented and it's unlikely she has access to subscription-based decision databases. In contrast, neutrally cited cases are available on the Canadian Legal Information Institute's website, www.CanLII.org, where they may be accessed at no cost.

_____

Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia